IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 628

INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellants,

v.

COLUMBUS AND GREENVILLE RAILWAY COMPANY,
Appellee.

MOTION TO DISMISS APPEAL OR TO AFFIRM

ATTORNEYS FOR APPELLEES:
ROBERT C. STOVALL,
Columbus, Mississippi.
FORREST B. JACKSON,
Jackson, Mississippi.

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MOTION OF APPELLEE TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM AS PRESENTING NO SUBSTANTIAL QUESTION REQUIRING FURTHER ARGUMENT.

May It Please the Court:

The Columbus and Greenville Railway Company, Appellee, now respectfully moves this Honorable Court to

dismiss this appeal, or in the alternative, to affirm as presenting no substantial question requiring further argument, under the provisions of *Rule* 7, *Paragraphs* 3 *and* 4, and in support of this motion would, with respect and deference, show and urge the following:

I.

The appeal was not perfected within thirty (30) days as required by *U. S. C. Title* 28, *Section* 47 (Act of October 22, 1913, 32, 38 Stat. 220), which provides that appeals from an order granting or denying an interlocutory injunction after notice and hearing shall be *"taken within thirty days after the order* * * * *"* "and *upon final hearing* of any suit brought to suspend or set aside, in whole or in part, any order of said commission *the same requirement as to judges and the same procedure as to expedition and appeal shall apply."*

The order here, suspending and setting aside the order of the Commission, was entered on August 17, 1942. The petition for appeal was presented and allowed on October 14, 1942, exactly fifty-eight (58) days later. The appeal was perfected sometime later. (Tr. 76).

True. *U. S. C. Title* 28, *Section* 47a, provides: "A final judgment or decree of the district court in the cases specified in Section 44 of this title may be reviewed by the Supreme Court * * * if appeal * * * be taken by an aggrieved party within sixty (60) days after the entry of such final judgment or decree, * * * And in such cases the notice required shall be served upon the defendants in the case *and upon the Attorney General of the State."* (Tr. 75).

Thus demonstrating that the appeals there referred to are those in which the State has some direct interest, which does not apply in the instant case.

Therefore, *U. S. C. Title* 28, *Section* 47, here applies and the Court is without jurisdiction, since the appeal came too late.

Hartford Acci. & Indemnity Co. v. Bunn, 285 U. S. 169; 76 L. Ed. 685.

I-A.

The appeal here was attempted to be allowed by the District Judge, without concurrence of either of the other judges composing the statutory Three-Judge Court, and should be dismissed. (Tr. 76).

Rule 36, *of the Revised Rules of the Supreme Court of the United States* seems to permit the procedure followed in attempting to obtain the appeal here, in that said *Rule* 36, provides that an appeal from a district court to the Supreme Court may be allowed "by any judge of the district court, including a circuit judge assigned thereto, or by a justice of this court."

However, *U. S. C., Title* 28, *Section* 47, provides in part: "and upon final hearing on any suit brought to suspend or set aside, in whole or in part, any order of said commission *the same requirement as to judges* and the same procedure as to expedition *and appeal shall apply.*" (Italics ours).

Compare: *U. S. C., Title* 28, *Section* 792.

We submit, with deference, that the statutory provision controls and that "the same requirement as to judges" applies to all matters finally disposing of the cause, such as the granting of the petition for appeal, especially since the statute requires "the same procedure as to expedition

and appeal shall apply." That the Statutory Three-Judge Court must act through a majority concurring as to all matters, involving the effort to suspend or set aside an order of the Interstate Commerce Commission, seems to us required under the above provision.

An analogous situation is presented on writs of error, now appeals, from the Highest Appellate Courts of a State, and the requirement of statute and by *Rule* 36, *paragraph* 1. No other judge except the Chief Justice, or Presiding Justice of the State Court, or a Justice of this Court can allow an appeal, and the requirement has long been held to be jurisdictional.

Compare: *Bartemeyer v. Iowa*, 81 U. S. (14 Wall.) 26, *Gleason v. Florida*, 76 U. S. (9 Wall.) 779, and, *Butler v. Gage*, 138 U. S. 52.

The appeal for this further reason should be dismissed.

II.

If the Motion to Dismiss is denied, then in the alternative, the Appellee urges to affirm because the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The District Court found that "the facts in the case are not in dispute." And: "The testimony shows without dispute that this tariff is profitable to plaintiff; that by its provisions and enforcement none of the capital investment of plaintiff is impaired; that the connecting carriers receive the entire proceeds from the rates as published applicable to them; and that plaintiff absorbs the entire amount of this cut-back. The testimony shows too that it does not vary in any respect whatsoever from the published tariff." (Tr. 68).

District Court in commenting on the findings of the Commission said:

> "The Commission did not find that the tariff was unreasonable, unjust or discriminatory, but determined that the form and manner in which the tariff is published does not conform to the requirements of Section 6(4) and 6(7) of the Act, and that it was unlawful by virtue of Section 1(6) of the Act. The Commission was without power to declare the tariff unlawful unless it found from the evidence as a fact that the tariff was in violation of 6(4) and 6(7) or otherwise violated 1(6)." (Tr. 68).

Compare: *Splawn, Commissioner, dissenting.* (Tr. 11-12).

Appellants urge in Jurisdictional Statement, contrary to the above holding:

> "The question presented by this appeal is a substantial one. It involves an interpretation and application of Sections 1(6), 6(4) and 6(7) of the Interstate Commerce Act in relation to the publication and establishment of joint rates. Aside from the local situation immediately affected, the decision of the lower court has established principles relating to the publication of joint rates which will have far-reaching effect. Since these principles are contrary to the well-recognized concept of joint rates, it is important that the Supreme Court pass finally upon them."

There is nothing in the entire record here, especially is there nothing in the decision of the District Court that affects joint rates. The District Court decided the issues presented under well-recognized principles of applicable law having to do with the reasonableness, justice and non-

discriminatory character of the tariff of the Appellant, which affects only the Appellant and has nothing to do with joint rates, as was found as a matter of law.

Substantial questions were settled by prior decisions of this Court in the following cases:

I. C. C. v. Delaware, etc., Railway, 220 U. S. 235,

I. C. C. v. L. & N. R. Co., 227 U. S. 88,

I. C. C. v. B. & O. R. Co., 145 U. S. 265,

Atchison T. & S. Ry. Co. v. U. S., 279 U. S. 768, especially,

T. & P. Ry. Co. v. I. C. C., 162 U. S. 197.

With which compare the following on substantial question here:

Alabama v. U. S., 279 U. S. 229,

McArthur v. U. S., 315 U. S. 787,

Zucht v. King, 260 U. S. 174, 176.

St. Louis and O'Fallon R. Co. v. U. S., 279 U. S. 461,

Werk v. Lorain Street Savings & Trust Co., 299 U. S. 512,

I. C. C. v. I. C. R. R. Co., 215 U. S. 452,

Therefore, the actual questions presented by this record have already been determined and the matters now sought to be injected were not necessary to be considered, or decided and are so unsubstantial as not to require further argument. The Cause should be affirmed.

CONCLUSION.

For the reasons above stated, urged and argued, the Appellee respectfully with deference submits that the Appeal should be dismissed; and, in the alternative, if in this mistaken, that the cause should be affirmed as presenting no substantial question requiring further argument.

Respectfully submitted,

COLUMBUS & GREENVILLE RAILWAY COMPANY,
Appellee.

By: ROBERT C. STOVALL,
FORREST B. JACKSON,
Its Attorneys.

CERTIFICATE OF SERVICE.

I, Forrest B. Jackson, of Counsel for Appellee, hereby certify that I have this date served on Daniel W. Knowlton, Chief Counsel, and Daniel H. Kunkel, Attorney for the Interstate Commerce Commission, and on John E. McCullough, Attorney for J. M. Kurn and John G. Lonsdale, Trustees of the St. Louis-San Francisco Railway Company; and, on Erle J. Zoll, Jr., Attorney for Illinois Central Railroad Company, all of the Appellants herein, a true and correct copy of the foregoing Motion, by mailing postage prepaid to their respective addresses.

This the 11th day of March, A. D., 1943.

Of Counsel.